Supreme Court, U.S.
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No. 96-31

In The

Supreme Court of the United States

October Term, 1995

EVELYN SMITH,

Petitioner,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of California

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT FAIR EMPLOYMENT AND HOUSING COMMISSION

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QUESTIONS PRESENTED

1. Did the California Supreme Court correctly conclude that California's law, which forbids marital status discrimination in housing operated as a business and for a profit, does not violate the Free Exercise Clause of the First Amendment to the United States Constitution?

2. Did the California Supreme Court correctly conclude that California's law, which forbids marital status discrimination in housing operated as a business and for a profit, does not violate the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.*?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT FAIR EMPLOYMENT AND HOUSING COMMISSION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS ... 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

REASONS TO DENY PETITION FOR WRIT OF CERTIORARI 6

I

THE ISSUES IN THIS CASE ARE IDENTICAL TO THOSE IN *SWANNER*, AND REVIEW BY THIS COURT IS EQUALLY UNWARRANTED HERE 7

II

THE CALIFORNIA SUPREME COURT CORRECTLY DETERMINED THAT STATE LAWS PROHIBITING DISCRIMINATION DO NOT VIOLATE FEDERAL CONSTITUTIONAL OR STATUTORY RIGHTS OF FREE EXERCISE 9

A. No First Amendment free exercise rights are implicated, as California is merely applying a neutral law of general applicability to prohibit discrimination 9

B. Applying well-established case law, the California Supreme Court properly determined that no 'substantial burden' exists, and this disposes of petitioner's claim under RFRA 12

TABLE OF CONTENTS – Continued

Page

C. The decision below does not create an impossible standard for deciding whether a 'substantial burden' exists 16

D. The decision by the California Supreme Court does not conflict with any other state court decisions 18

E. No confusion exists among federal appeals courts, but even if it did, this is no reason to grant review here 20

III

CALIFORNIA'S PROHIBITION OF DISCRIMINATION SERVES COMPELLING AND IMPORTANT STATE INTERESTS BY THE LEAST RESTRICTIVE MEANS ... 21

A. California's ban on marital status discrimination in housing serves several compelling state interests 22

1. California's constitutional right to privacy includes the right to be free from marital status discrimination in housing 22

2. California also has a compelling interest in protecting tenants' freedom of intimate association 23

3. California has a compelling commitment to eradicating all discrimination by business establishments 24

B. A complete ban of discriminatory practices is the most effective means to eradicate discrimination 27

TABLE OF CONTENTS – Continued

Page

IV

AN EXEMPTION FOR LANDLORDS WITH RELIGIOUS OBJECTIONS TO ANTIDISCRIMINATION LAWS WOULD BE UNCONSTITUTIONAL 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592 (1982) 25

Atkisson v. Kern County Housing Authority, 59 Cal.App.3d 89, 130 Cal.Rptr. 375 (1976) 3, 23

Attorney General v. Desilets, 418 Mass. 316, 636 N.E.2d 233 (1994) 5, 19

Barrows v. Jackson, 346 U.S. 249 (1953) 24

Board of Dirs. of Rotary International v. Rotary Club, 481 U.S. 537 (1987) 24, 25

Board of Ed. of Kiryas Joel v. Grumet, ___ U.S. ___, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) 29

Bob Jones University v. United States, 461 U.S. 574 (1983) 15, 27, 29

Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948) 11, 24

Braunfeld v. Brown, 366 U.S. 599 (1961) 12, 15

Burks v. Poppy Construction Co., 57 Cal.2d 463, 20 Cal.Rptr. 609, 350 P.2d 313 (1962) 11

Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) 8, 16, 27

City of Santa Barbara v. Adamson, 27 Cal.3d 123, 164 Cal.Rptr. 539, 610 P.2d 436 (1980) 3, 23, 24

Employment Division v. Smith, 494 U.S. 872 (1990) 4

TABLE OF AUTHORITIES – Continued

Page

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) 15, 29

Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207 (1980) 7

Fox v. City of Los Angeles, 22 Cal.3d 792, 150 Cal.Rptr. 867, 587 P.2d 663 (1978) 28

Gantt v. Sentry Insurance, 1 Cal.4th 1083, 4 Cal.Rptr.2d 874, 824 P.2d 680 (1992) 25

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 11

Hernandez v. Commissioner, 490 U.S. 680 (1989) ... 5, 12, 15

Hicks v. Garner, 69 F.3d 22 (5th Cir. 1995) 20

Hill v. National Collegiate Athletic Association, 7 Cal.4th 1, 26 Cal.Rptr.2d 834, 865 P.2d 633 (1994) ..3, 22

Hishon v. King & Spalding, 467 U.S. 69 (1984) 11

In re Cox, 3 Cal.3d 205, 90 Cal.Rptr. 24, 474 P.2d 992 (1970) 14

Koire v. Metropolitan Car Wash, 40 Cal.3d 24, 219 Cal.Rptr. 133, 707 P.2d 195 (1985) 25

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 6

Lemon v. Kurtzman, 403 U.S. 602 (1971) 28

Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996) 20

Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721, 180 Cal.Rptr. 496, 640 P.2d 115 (1982), *cert. denied*, 459 U.S. 858 25

TABLE OF AUTHORITIES – Continued

Page

New York State Club Association v. NYC, 487 U.S. 1 (1988) 25

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) 20

Otten v. Baltimore & Ohio R. Co., 205 F.2d 58 (2d Cir. 1953) 15

Pines v. Tomson, 160 Cal.App.3d 370, 206 Cal.Rptr. 866 (1984) 29

Reitman v. Mulkey, 387 U.S. 369 (1967) 14

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 11, 24, 27

Shelley v. Kraemer, 334 U.S. 1 (1948) 24

Sherbert v. Verner, 374 U.S. 398 (1963) 13

State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990) 4, 19

Swaggart v. Board of Equalization, 493 U.S. 378 (1990) 5, 12, 15

Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274 (Alaska 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 460, 130 L.Ed.2d 368 ..... *passim*

Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) 12

United States v. Lee, 455 U.S. 252 (1982) 5, 15, 30

Walker v. Superior Court, 47 Cal.3d 112, 253 Cal.Rptr. 1, 763 P.2d 852 (1988) 29

Wisconsin v. Yoder, 406 U.S. 205 (1972) 5, 15, 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND CONSTITUTIONS

42 United States Code

§ 2000bb 1, 5, 12

§ 2000bb-1 5

§ 2000bb-2 13

§ 2000bb-4 28

California Government Code

§ 12920 ..... 2, 25, 27

§ 12927 26

§ 12955 26

§ 12955.4 26

California Statutes,

1963, ch. 1853, § 2 26

1980, ch. 992, § 4 26

1992, ch. 182, § 3 26

United States Constitution, Amendment I ..... *passim*

California Constitution,

Article I, § 1 ..... 1, 3, 22

Article I, § 4 ..... 1, 28

OTHER

Senate Report No. 103-111, 103d Congress, 1st Session, *reprinted in* 3 U.S.C.C.A.N. 1892 (1993) 13

Respondent Fair Employment and Housing Commission of the State of California (Commission) respectfully files this brief in opposition to the petition for writ of certiorari.

The petition seeks review of *Smith v. Fair Employment & Housing Com.*, 12 Cal.4th 1143, 51 Cal.Rptr.2d 700, 913 P.2d 909 (1996). The California Supreme Court held, as a matter of state law, that California's statutory proscription against marital status discrimination in housing prohibits a landlord from denying housing to an unmarried couple based on their marital status. It further held that the state's ban on marital status discrimination in housing offends neither the Free Exercise Clause of the United States Constitution nor the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq* (RFRA).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to, and to correct, the constitutional and statutory provisions cited by petitioner, the Commission submits the following provisions:

"Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1, subd. (b).

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const. art. I, § 1 (West 1983).

"Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion." Cal. Const. art. I, § 4 (West 1983).

"[T]he practice of discrimination because of race, color, religion, sex, marital status, national origin, ancestry, familial

status, or disability in housing accommodations is declared to be against the public policy. . . . [¶] This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state." Cal. Gov't Code § 12920 (West Supp. 1996).

STATEMENT OF THE CASE

The Commission agrees, in substantial part, with petitioner's statement of the case. Petitioner Evelyn Smith owns housing units that she rents, for profit and for business purposes, to the general public, but she will not rent to unmarried couples and prefers to rent to married couples. Petitioner's Appendix (App.) 196a-198a, ¶¶4, 5, 7-11.

Gail Randall and Kenneth C. Phillips, an unmarried couple, named here as respondents and below as real parties in interest, filed complaints with California's Department of Fair Employment and Housing after petitioner refused to rent one of her units to them because of their marital status. App. 195a, ¶1-2; App. 198a, ¶11. After an administrative hearing, the Commission ruled that petitioner's conduct was unlawful discrimination under state law. App. 209a.

Thereafter, the California Supreme Court affirmed the Commission's ruling that petitioner violated state law, and further held that application of state law to petitioner did not violate her state constitutional rights. *Smith v. FEHC*, 12 Cal.4th at 1160, 1178-1179,[1] App. 18a, 43a-45a. It also rejected petitioner's claims that she was entitled to an exemption from state law under either the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act of 1993. *Smith v. FEHC*, 12 Cal.4th at 1161, 1176, App. 19a, 40a-42a.

Several specific statements in petitioner's Statement of the Case, though not of critical importance, are not supported

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[1] The decision by the California Supreme Court will be referred to as "*Smith v. FEHC*" to distinguish it from this Court's own *Smith* decision.

by petitioner's citations. First of all, nothing indicates petitioner "earns her livelihood" from her housing rental business. Cert. Pet., p. 2. She "owns and rents four rental units. . . . They are operated exclusively for business and commercial purposes, with income generated from the rentals reported as business income. The business is not operated or classified as a religious, charitable or other nonprofit concern." *Smith v. FEHC*, 12 Cal.4th at 1151, App. 3a, 196a, ¶4.

Also, nothing indicates she "began renting the town homes 1-3 years before the California Legislature prohibited marital status discrimination in housing in 1975." Cert. Pet., p. 2. Housing discrimination based on marital status violates California's constitutional right of privacy, as well as state statutes. *Atkisson v. Kern County Housing Authority*, 59 Cal.App.3d 89, 98, 130 Cal.Rptr. 375 (1976). An express constitutional guarantee of the right of privacy was adopted in 1972. Cal. Const. art. I, § 1 (West 1983); *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 15, 26 Cal.Rptr. 834, 865 P.2d 633 (1994). California's constitutional right to privacy is protected against private intrusion as well as state action. *Id.* at 17-18. This right includes "the right to live with whomever one wishes or, at least, to live in an alternate family with persons not related by blood, marriage, or adoption." *City of Santa Barbara v. Adamson*, 27 Cal.3d 123, 130, 164 Cal.Rptr. 539, 610 P.2d 436 (1980) (footnote omitted).

Petitioner cites the posting order in the Commission's decision. Cert. Pet., pp. 5-6. This reference is out of date, as the portion of the order to which she refers is no longer in effect. *Smith v. FEHC*, 12 Cal.4th at 1164, n.15, App. 24a, n.15.

Finally, petitioner attempts to diminish the import of the decision of the California Supreme Court by saying there was no majority, only a plurality. Cert. Pet., pp. 9-10. In fact, Justice Mosk, the fourth Justice to rule in favor of the Commission, stated, "I generally concur in the opinion prepared by Justice Werdegar. I largely join in its analysis. I fully join in its disposition. . . . [¶] I write separately to consider the Religious Freedom Restoration Act of 1993. . . . " *Smith v.*

FEHC, 12 Cal.4th at 1179-1180, App. 47a (Mosk, J., concurring).

SUMMARY OF ARGUMENT

This petition presents precisely the same issues that this Court found did not warrant review in *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 460, 130 L.Ed.2d 368. There, as here, a landlord would "not rent to those whom he expects will engage in conduct repugnant to his religious beliefs, namely cohabitation outside of marriage." *Id.*, 874 P.2d at 278. The Supreme Court of Alaska, like the Supreme Court of California, determined that this policy violated state law. *Id.* at 276, 278. The Alaskan court also rejected the landlord's federal claims, holding that "enforcing the fair housing laws does not deprive him of his right to free exercise of his religion." *Id.* at 276. The California Supreme Court reached the identical conclusion.

In analyzing the landlords' constitutional free exercise claims, both state supreme courts applied the standard set by this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), and found there was no constitutional violation. *Swanner*, 874 P.2d at 279, 280; *Smith v. FEHC*, 12 Cal.4th at 1162.

Both state supreme courts also considered whether their state laws violated the federal Religious Freedom Restoration Act of 1993, enacted after this Court's *Smith* decision. Although the California and Alaska Supreme Courts applied different portions of the RFRA test, they arrived at the same conclusion: a state law prohibiting marital status discrimination in housing operated for commercial purposes does not violate RFRA, despite a landlord's religious objections to such proscription. *Swanner*, 874 P.2d at 280, n.9; *Smith v. FEHC*, 12 Cal.4th at 1176.

Contrary to petitioner's representations, the decision by the California Supreme Court conflicts with no other decision by a state supreme court, insofar as these decisions interpret and apply federal law. *State by Cooper v. French*, 460 N.W.2d

2 (Minn. 1990), was based entirely on interpretation of state law, with the Minnesota Supreme Court expressly declining to address federal law. *Id.* at 11. *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994), likewise merely interpreted state law and concluded that summary judgment was not warranted. *Id.* at 241. And, as discussed above, *Swanner* reached the same result as this case.

Petitioner asserts that some federal courts are confused as to the proper test for determining whether a substantial burden exists for purposes of RFRA. Cert. Pet., pp. 23-24. This argument both overstates the extent of any confusion, and, more importantly, fails to diminish the sound reasoning of the California Supreme Court as to this issue. *Smith v. FEHC* rests on a well-established body of pre-*Smith* case law describing what constitutes a substantial burden on free exercise rights. This Court has clearly explained that not every burden, but only a significant, undue burden, is legally cognizable so as to require justification. *See, e.g., Swaggart v. Board of Equalization*, 493 U.S. 378, 392 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

> [E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. 252, 261 (1982).

In adopting RFRA, Congress did not change the requirement that a substantial burden must exist before free exercise rights are even implicated. To the contrary, RFRA explicitly provides that free exercise must be "substantially burdened" as a prerequisite to any need for further review. *See* 42 U.S.C. §§ 2000bb, subds. (a)(3), (b)(1) and (b)(2), 2000bb-1, subds. (a) and (b). RFRA clearly looks to this Court's decisions holding that a finding of a substantial burden is the first step in determining whether any free exercise rights are infringed.

The only change RFRA made was to restore the pre-*Smith* standard for the second step in the analysis, so that if a substantial burden does exist, the government must then show both a compelling interest and that it is using the least restrictive alternative.

Finally, even if this Court were to agree with petitioner as to the burden being legally significant, review by this Court is still unnecessary. If a substantial burden exists and RFRA applies, California has compelling state interests in eradicating discrimination, protecting privacy rights, and avoiding any establishment of, or preference for, religion. These vital concerns all support the state's denial of petitioner's demand that she be exempted from compliance with state law forbidding housing discrimination based on marital status.

REASONS TO DENY PETITION FOR WRIT OF CERTIORARI

"A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, Supreme Court Rules. Petitioner fails to satisfy this standard.

While this case involves important issues, petitioner shows nothing requiring this Court's attention. Although the decision by the California Supreme Court has attracted some public attention, it makes no new or special law. It merely applies well-established principles to a particular set of facts.

Furthermore, petitioner's argument that this case conflicts with prior decisions of this Court and with decisions from three other state supreme courts is inaccurate. A careful review of these decisions shows that they are "really in harmony, and not in conflict, and that there [is] no ground for [this Court] allowing the writ of certiorari to add to an already burdened docket." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-393 (1923).

This is not a case which this Court needs to review.

I. THE ISSUES IN THIS CASE ARE IDENTICAL TO THOSE IN *SWANNER*, AND REVIEW BY THIS COURT IS EQUALLY UNWARRANTED HERE

Just two years ago, the Supreme Court of Alaska ruled that federal law did not preclude Alaska's prohibition of marital status discrimination in housing generally available to the public, despite a landlord's religious objections to unmarried couples sharing housing, and this Court denied a petition for writ of certiorari, with only one dissenting voice. *Swanner*, 115 S.Ct. 460, 130 L.Ed.2d 368.

Swanner could scarcely be more similar to this case. There, a landlord "refused to rent or allow inspection of residential properties after learning that each complainant intended to live with a member of the opposite sex to whom he or she was not married." *Id.*, 874 P.2d at 276-277. The landlord "readily admitted having a policy of refusing to rent to any unmarried couple who intend to live together on the property." *Id.* at 277. His "refusal to rent or show property to unmarried couples is based on his Christian religious beliefs. Under Swanner's religious beliefs, even a non-sexual living arrangement by roommates of the opposite sex is immoral and sinful. . . . " *Id.* The landlord claimed "he is excused from compliance with the anti-discrimination laws because of his fundamental right to the free exercise of his religion. . . . " *Id.* These facts are essentially identical to those presented here.

The Alaska Supreme Court ruled that the landlord's conduct violated state and local laws forbidding discrimination in housing based on marital status. *Id.* at 278. The California Supreme Court reached the same conclusion under California's anti-discrimination statutes. *Smith v. FEHC*, 12 Cal.4th at 1160. These portions of the decisions, involving questions of state law, have been finally determined by the highest court of each state, and are not subject to review by this Court. *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 226, n.9 (1980).

As to the landlord's federal constitutional claims, the Alaska Supreme Court ruled that "enforcing the fair housing laws does not deprive him of his right to free exercise of his

religion." *Swanner*, 874 P.2d at 276. Here, again, the California Supreme Court reached the identical conclusion, finding that the "First Amendment does not support Smith's claim." *Smith v. FEHC*, 12 Cal.4th at 1161. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993), citing *Smith*, 494 U.S. 872.

In each case, this analysis defeated the landlord's First Amendment claim. The Alaska Supreme Court held that free exercise rights were not unconstitutionally burdened by a prohibition on marital status discrimination in housing because "any burden placed on Swanner's religion by the state and municipal interest in eliminating discrimination in housing falls on his conduct and not his beliefs. Here, the burden on his conduct affects his commercial activities." *Swanner*, 874 P.2d at 283. The California Supreme Court similarly applied the analysis in *Smith* and concluded that California law, which merely prohibits conduct, not belief, "does not violate the free exercise clause. . . . " *Smith v. FEHC*, 12 Cal.4th at 1162. " 'We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.' " *Id.* at 1164, quoting *Smith*, 494 U.S. at 878-879.

Both state supreme courts further held that state law barring housing discrimination based on marital status did not violate the Religious Freedom Restoration Act of 1993, even though the discrimination was motivated by religious beliefs. RFRA was enacted while the case was pending before the Alaska Supreme Court, but the court determined that RFRA made no difference.

> Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because . . . compelling state interests support the prohibitions on marital status discrimination. The most effective tool the state has for combatting discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are narrowly tailored and there is no less restrictive alternative.

Swanner, 874 P.2d at 280, n.9.

As noted above, the California Supreme Court looked to a different provision of RFRA to determine that RFRA did not preclude application of state law. Unlike the Alaska Supreme Court, the California Supreme Court did not assume that the prerequisite for application of RFRA – that is, a substantial burden – existed. Instead, it questioned whether petitioner had met RFRA's threshold requirement and shown that the state law proscribing housing discrimination substantially burdened her free exercise rights. *Smith v. FEHC*, 12 Cal.4th at 1168. It found that "[t]his set of facts does not, under the relevant case law, support Smith's argument that requiring her to comply with FEHA's antidiscrimination provisions substantially burdens her religious exercise." *Id.* at 1176.

So, looking to different provisions of RFRA, the two state supreme courts reached identical conclusions. Both found that a landlord could not assert RFRA as a defense to violation of state laws forbidding housing discrimination based on marital status.

This Court denied a petition for writ of certiorari as to *Swanner*, and no significant changes in the law have occurred since the Court made this decision. Review of this case is equally unwarranted.

II. THE CALIFORNIA SUPREME COURT CORRECTLY DETERMINED THAT STATE LAWS PROHIBITING DISCRIMINATION DO NOT VIOLATE FEDERAL CONSTITUTIONAL OR STATUTORY RIGHTS OF FREE EXERCISE

A. No First Amendment free exercise rights are implicated, as California is merely applying a neutral law of general applicability to prohibit discrimination.

Petitioner's request for review fails to distinguish between her claim under the Free Exercise Clause and her claim under RFRA. Her implicit suggestion that the same standards apply to both claims ignores the lesson of *Smith*.

In *Smith*, this Court distinguished between the constitutional right to believe and profess whatever religious doctrine

one chooses, and the right to engage in specific conduct. *Id.*, 494 U.S. at 877-878. As to the latter, it said, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-879.

Petitioner weakly proffers two reasons why *Smith* does not totally destroy any claim that her constitutional rights are being violated by the application of state law. First, she says that the California law is not a statute of general applicability because some university housing is exempted from coverage under state law. Cert. Pet., p. 28. However, the California Supreme Court's interpretation of state law belies this contention.

> The statutory prohibition against discrimination because of marital status (Gov. Code, § 12955) is a law both generally applicable and neutral towards religion. The law is generally applicable in that it prohibits all discrimination without reference to motivation. The law is neutral in that its object is to prohibit discrimination irrespective of reason – not because it is undertaken for religious reasons.

Smith v. FEHC, 12 Cal.4th at 1161-1162. This interpretation of state law by the highest court in the state must be accepted. *Exxon Corp.*, 447 U.S. at 226, n.9.

Petitioner also asserts that this case is entitled to strict scrutiny under the compelling interest standard based on an exception outlined in *Smith* for so-called "hybrid" claims, where a free exercise claim is asserted "in conjunction with other constitutional protections. . . . " *Smith*, 494 U.S. at 881. She relies, in part, on the posting order issued by the Commission. Cert. Pet., pp. 28-29. However, the Commission agreed to eliminate the portions of the posting order to which she objected. *Smith v. FEHC*, 12 Cal.4th at 1164, n.15. This is no longer an issue.

Petitioner also argues that the compelling interest test is required due to a "taking" of her property rights, in that she can no longer exclude persons to whom she objects and can not exercise her rights as a property owner. Cert. Pet., p. 29. This Court need not concern itself with this argument. The

feebleness of any claim that a state law prohibiting discrimination by places of public accommodation amounts to a violation of substantive due process has been apparent to the Court since one of its first decisions under the modern civil rights statutes.

> Thirty-two States now have it on their books either by statute or executive order and many cities provide such regulation. Some of these Acts go back four-score years. It has been repeatedly held by this Court that such laws do not violate the Due Process Clause of the Fourteenth Amendment. Perhaps the first such holding was in the Civil Rights Cases themselves. . . . [t]he constitutionality of such state statutes stands unquestioned.

Heart of Atlanta Motel v. United States, 379 U.S. 241, 259-260 (1964) (footnote omitted). *See also Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 34, n.12 (1948); *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984).

California has long prohibited discrimination in places of public accommodation, including housing, rejecting any contention that this prohibition violates due process and recognizing that "[u]nder the police power reasonable restrictions may be placed upon the conduct of any business and the use of any property . . . , and the restriction here imposed in furtherance of the policy against discrimination is reasonable." *Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 471, 20 Cal.Rptr. 609, 350 P.2d 313 (1962).

Petitioner has presented nothing to warrant re-examination of this well-settled issue. "Invidious private discrimination . . . has never been accorded affirmative constitutional protections." *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

In any event, separate attention to petitioner's contention that this is a "hybrid" case is not required. As the California Supreme Court recognized, the "hybrid" issue need not be considered since "the effect is simply to require us to apply the same test we must apply in any event under the Religious Freedom Restoration Act. . . . " *Smith v. FEHC*, 12 Cal.4th at

1165. As discussed below, no RFRA violation exists, so even if this were a "hybrid" case, there is no constitutional violation.

B. Applying well-established case law, the California Supreme Court properly determined that no 'substantial burden' exists, and this disposes of petitioner's claim under RFRA.

RFRA, like pre-*Smith* Free Exercise Clause analysis, requires a plaintiff to show that governmental action imposes a *substantial* burden on free exercise of religion before the government is required to justify its action. "[G]overnments should not *substantially* burden religious exercise without compelling justification." 42 U.S.C. § 2000bb, subd. (a)(3) (emphasis added). The purpose of RFRA was (1) to make the compelling interest test applicable "in all cases where free exercise of religion is *substantially* burdened; and (2) to provide a claim or defense to persons whose religious exercise is *substantially* burdened by government." 42 U.S.C. § 2000bb, subd. (b) (emphasis added).

The California Supreme Court recognized that RFRA reaffirms the many prior decisions by this Court requiring a substantial burden before free exercise rights are implicated.

> Under RFRA, unless the challenged law imposes a *substantial burden*, the government need not demonstrate a compelling interest justifying the law or show that the law is the least restrictive means to further the interest.

Smith v. FEHC, 12 Cal.4th at 1168 (court's emphasis).

This accurately describes pre-*Smith* decisions. "The free exercise inquiry asks whether government has placed a *substantial* burden on the observation of a central religious belief or practice. . . . " *Hernandez*, 490 U.S. at 699 (emphasis added). *See also Swaggart*, 493 U.S. at 384-392; *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303-305 (1985); *Braunfeld v. Brown*, 366 U.S. 599, 605-606 (1961).

The California Supreme Court was also correct in recognizing that RFRA did not change this portion of free exercise analysis. As explained in RFRA's legislative history:

> Pre-*Smith* case law makes it clear that only governmental actions that place a substantial burden on the exercise of religion must meet the compelling interest test set forth in the act. The act thus would not require such a justification for every government action that may have some incidental effect on religious institutions.

S. Rep. No. 103-111, 103d Cong., 1st Sess., *reprinted in* 3 U.S.C.C.A.N. 1892, 1898 (1993) (footnotes omitted).

Petitioner does not actively dispute that she must establish a substantial burden; she merely contends that the California Supreme Court employed an "extreme definition of 'substantial burden,' " that "grossly conflicts with decisions of this Court." Cert. Pet., pp. 11, 15. She laments that "the California Supreme Court has pushed out of reach for most people the protections of the Religious Freedom Restoration Act and the Free Exercise Clause." Cert. Pet., p. 11.

Although petitioner complains about the decision below, the real focus of her complaint is the very nature of free exercise rights themselves. Not every infringement, no matter how trivial or legally insignificant, warrants protection, and the California Supreme Court carefully considered what situations have been found to impose a substantial burden on free exercise rights. As it recognized, Congress, in enacting RFRA, did not define a "substantial burden."[2] *Smith v. FEHC*, 12 Cal.4th at 1169.

So, the California Supreme Court painstakingly reviewed this Court's pre-*Smith* decisions to determine what facts constitute a substantial burden. It first considered the unemployment insurance cases, such as *Sherbert v. Verner*, 374 U.S. 398 (1963).

> This case . . . differs from the unemployment compensation cases. . . . [T]he degree of compulsion

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[2] RFRA does define other terms. *See* 42 U.S.C. § 2000bb-2.

> involved is markedly greater in the unemployment compensation cases than in the case before us. In the former instance, one can avoid the conflict between the law and one's beliefs about the Sabbath only by quitting work and foregoing compensation. To do so, however, is not a realistic solution for someone who lives on the wages earned through personal labor. In contrast, one who earns a living through the return on capital invested in rental property can . . . avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments.

Smith v. FEHC, 12 Cal.4th at 1170.

Another difference from unemployment compensation cases is that here, "Smith is involved in a commercial enterprise," and petitioner is seeking an exemption that would change "the course of her business." *Id.*[3] Petitioner colorfully characterizes California's anti-discrimination laws as having a "crushing impact," Cert. Pet., p. 12, but the state is merely regulating and placing an economic burden on her business activities insofar as they affect the public.

Furthermore, an economic consequence on the operation of a business has never been held to constitute a substantial burden for purposes of free exercise analysis. "[I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions."

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[3] Petitioner argues that the effect on victims of discrimination relates to the question of compelling state interest. Cert. Pet., p. 27. While this is true, petitioner fails to recognize that unlike an individual seeking unemployment benefits, she is seeking the freedom to discriminate while she engages in a commercial enterprise and operates a for-profit business that affects other persons. Here, the state is regulating a business affected with a public interest, and prohibiting that commercial enterprise from discriminating. "Urban housing is clearly marked with the public interest." *Reitman v. Mulkey*, 387 U.S. 369, 385 (1967) (Douglas, J., concurring). *See also In re Cox*, 3 Cal.3d 205, 212, 90 Cal.Rptr. 24, 474 P.2d 992 (1970).

Braunfeld, 366 U.S. at 606. *See also Swaggart*, 493 U.S. at 391; *Hernandez*, 490 U.S. at 699.

The California Supreme Court also considered *Yoder*, the other decision by this Court to which Congress specifically referred in adopting RFRA. There, religious beliefs required parents to educate their children at home after the eighth grade, and if a state law forced Amish children to attend high school, "the harm to the Amish way of life is permanent." *Smith v. FEHC*, 12 Cal.4th at 1171. Here, there is no religious belief requiring petitioner to rent apartments, so the burdens are quite different. *Id.*

This Court's prior decision most like this case is *Bob Jones University v. United States*, 461 U.S. 574 (1983). There, as here, a business had religious objections to complying with non-discrimination laws. In that case, a private school was compelled to choose between adhering to its discriminatory beliefs, founded in religious principles, and receiving tax benefits. This Court refused to find that forcing the business to make this choice violated free exercise guarantees. *Id.* at 603-604.

Here, too, application of California law will not prevent petitioner from observing her religious tenets, and will not compel her to engage in conduct she finds sinful. Nothing in either state law or her religious beliefs compels her to rent housing; so there is no inescapable conflict. She had no right to inject her religious beliefs into her business interactions with members of the public. *Lee*, 455 U.S. at 261. "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (L. Hand, J.), quoted in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985).

The California Supreme Court acted in full accordance with the prior decisions of this Court in determining that California's anti-discrimination law imposes no legally significant burden on petitioner.

C. The decision below does not create an impossible standard for deciding whether a 'substantial burden' exists.

Petitioner asserts, with no authority, that the California Supreme Court has made free exercise guarantees inaccessible in most cases. Cert. Pet., p. 11. She fails to recognize that, as discussed above, the California Supreme Court merely applied the standards set out by this Court.

Under those well-established standards, a substantial burden does exist in certain situations, and nothing in the decision below suggests that in similar situations, a substantial burden will not continue to be found. The California Supreme Court distinguishes the "line of cases holding that a state may not refuse to pay unemployment compensation to a claimant who quit a job for religious reasons." *Smith v. FEHC*, 12 Cal.4th at 1169-1170. The court never suggests that it would not find that a legally cognizable burden exists in situations similar to those in the unemployment compensation cases.

The California Supreme Court also addresses, and distinguishes, *Yoder*. There, the issue was whether criminal penalties could be imposed on parents who refused to send their children to school after the eighth grade, because they believed that further schooling would destroy their ability to live according to the Amish religion and way of life. "The impact of the compulsory-attendance law on [their] practice of the Amish religion is not only severe, but inescapable. . . . " *Yoder*, 406 U.S. at 218. Again, the California Supreme Court contrasted that situation with petitioner's. *Smith v. FEHC*, 12 Cal.4th at 1171. It certainly did not intimate that this Court should have ruled against the Amish.

Petitioner's suggestion that the California Supreme Court's reasoning would have led to a contrary result in *Church of Lukumi* is equally groundless. Indeed, the majority's only mention of this case is in its discussion of the First Amendment, when it notes that the law in this case, unlike that in *Church of Lukumi*, is not directed at any particular religion. *Smith v. FEHC*, 12 Cal.4th at 1161-1162.

The California Supreme Court correctly recognized that although it would be possible to grant absolute protection to free exercise rights, whether or not there was any substantial burden, this is not the case under RFRA anymore than it is under constitutional analysis. "Congress pointedly retained the threshold requirement in RFRA." *Smith v. FEHC*, 12 Cal.4th at 1169.

> One can imagine an accommodation doctrine, such as that which RFRA embodies, without the threshold requirement of a substantial burden. The resulting law would look something like this: When a person understood his or her religious beliefs as demanding that an activity be conducted in a particular way, and when the state required the activity to be conducted in a different way, the state would in every such instance be obliged to justify its law with a compelling interest and a showing that the law represented the least restrictive means to further the interest. . . . [T]o abandon the threshold requirement of a substantial burden would considerably alter the nature and efficacy of legal duties in our constitutional system: Each person would unilaterally decide, in each of the multitude of situations affected by state regulation, which laws to obey and which to ignore.

Id. at 1168. "The threshold requirement of a 'substantial burden' help[s] . . . avoid this potential for unlimited conflict between the multitude of laws and the multitude of religious beliefs." *Id.* at 1169.

In enacting RFRA, Congress chose to preserve "substantial burden" as a prerequisite to asserting a claim that free exercise rights are infringed. RFRA does not say that *any* burden on the free exercise of religion suffices; only a substantial burden triggers the need to justify government action. To the extent that petitioner believes this requirement is too difficult to meet, she must address her concerns to Congress, not this Court.

D. The decision by the California Supreme Court does not conflict with any other state court decisions.

Petitioner attempts to create a conflict where none exists, in order to convince the Court that this case merits its attention. She asserts that the decision below by the California Supreme Court conflicts with decisions from three other state supreme courts, Cert. Pet., pp. 20-23, but she is wrong.

The Supreme Court of Alaska, in *Swanner*, reached the identical result as the California Supreme Court. As discussed above, both courts concluded that state laws banning marital status discrimination in housing do "not deprive [a landlord] of his right to free exercise of his religion." *Id.*, 874 P.2d at 276. *See also Smith v. FEHC*, 12 Cal.4th at 1161, 1176.

The two courts did follow different paths in analyzing the landlords' RFRA claims, but they reached the same conclusion. *Swanner* found that RFRA was not violated because a compelling state interest existed. *Id.*, 874 P.2d at 280, n.9. This is certainly not in conflict with *Smith v. FEHC*, as the California Supreme Court never reached this issue. *Id.*, 12 Cal.4th at 1176, n.21.

Swanner, on the other hand, did not even consider whether this threshold requirement for a RFRA violation was satisfied. "Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because we hold in the next section that compelling state interests support the prohibitions on marital status discrimination," said the Alaska Supreme Court. *Id.*, 874 P.2d at 280, n.9. The court's assumption that RFRA was applicable is the *only* notable difference between *Swanner* and this case.

A review of the next section of *Swanner* shows that the Alaska Supreme Court skipped past the threshold analysis for a RFRA violation because Alaska's own constitutional protection for free exercise of religion, unlike the federal statutory guarantee, does *not* require any showing of a substantial burden. Under the Alaska Constitution, "to invoke a religious exemption, three requirements must be met: (1) a religion is involved, (2) the conduct in question is religiously based, and

(3) the claimant is sincere in his/her religious belief." *Swanner*, 874 P.2d at 281.

Because no substantial burden need be shown to establish a violation of the Alaska Constitution, the Alaska Supreme Court proceeded directly to the compelling interest test, which is also the second portion of the RFRA test. It never decided whether or not a substantial burden existed because it was not required to do so under state law, which provided greater protection for freedom of religion than did federal law.

In *Desilets*, the Supreme Judicial Court of Massachusetts found that state law did bar marital status discrimination by a landlord, and then reversed a summary judgment in favor of the landlord. It concluded that "neither party was entitled to summary judgment and that the summary judgment for the defendants should be vacated." *Id.*, 636 N.E.2d at 235.

As in *Swanner*, the focus of the court was the state constitution. "By applying the balancing test as we do, we extend protections to the defendants that are at least as great as those of the First Amendment. No further discussion of rights under the First Amendment is, therefore, necessary." *Desilets*, 636 N.E.2d at 236. In pure *dicta*, the court opined that its state constitutional standard "appears to be the same as that prescribed by the Religious Freedom Restoration Act of 1993. . . . " *Id.* at 236, n.5. This certainly is insufficient to create any conflict with the instant case.

Finally, petitioner cites a decision by the Supreme Court of Minnesota. There, the court concluded that Minnesota law did not bar discrimination against unmarried couples. The court expressly refused to decide whether the landlord would be entitled to an exemption under federal law. "Since our decision is based entirely on interpretation of state statutes and on the Minnesota Constitution, we need not address respondent's arguments as to the application of the United States Constitution, and we decline to do so." *French*, 460 N.W.2d at 11.

Not one of these cases, as compared to this case, creates any conflict which requires resolution by this Court.

E. No confusion exists among federal appeals courts, but even if it did, this is no reason to grant review here.

Finally, petitioner asks this Court to grant review because, she claims, "eight federal appeals courts have defined four different standards . . . " as to what constitutes a substantial burden. Cert. Pet., p. 23. She cites only two decisions – *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), and *Hicks v. Garner*, 69 F.3d 22 (5th Cir. 1995) – however, to support this contention.

Mack and *Hicks* both involve prisoner challenges alleging infringements of their free exercise rights.[4] *Mack* is actually two cases consolidated for appeal. In one, Muslim prisoners complained that they were unable to comply with religious rituals as to dining, abstinence, and prayer, which their religious beliefs required during the period of Ramadan. *Id.*, 80 F.3d at 1177. In the other, prisoners belonging to a religious sect known as the Moors, claimed they were refused permission to have a banquet that was an important rite. *Id.* at 1177-1178. In *Hicks*, a prisoner who was a Rastafarian objected to the prison's grooming requirements, that prohibited his dreadlocks. *Id.*, 69 F.3d at 24.

Mack says that circuits have given different answers to what constitutes a substantial burden under RFRA. *Mack*, 80 F.3d at 1178. It recognizes, however, that these alleged differences "may come to nothing in practice." *Id.* "[N]or is it clear that any of the holdings (as distinct from many of the dicta) are inconsistent." *Id.*

In *Hicks*, all that the Fifth Circuit decides is that the prisoner's claim under RFRA cannot be dismissed at the pleading stage as frivolous. *Id.*, 69 F.3d at 23. It notes that

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[4] Similar claims merited scant attention before the enactment of RFRA, since "[p]rison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringement of fundamental constitutional rights." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (rejecting challenge to rule prohibiting Muslim inmates from attending weekly services).

pre-RFRA, a prisoner's free exercise claims were analyzed under a less stringent "reasonable opportunity" test, but that after RFRA was enacted, such claims must be analyzed under the "substantial burden" test. *Id.* at 26. The appeals court does not elaborate on what that test involves, or whether it is satisfied in that case; it merely vacates dismissal and remands the case for further analysis. *Id.*

The Fifth Circuit does remark that RFRA is a new law, and said, in pure dicta, that its "standards have yet to be defined." *Id.* And it includes a footnote describing various post-RFRA decisions. *Id.* at 26, n.22. However, it fails to recognize that RFRA did not alter pre-*Smith* case law insofar as these cases already addressed what constitutes a substantial burden on the free exercise of religion.

Should this Court be presented with a decision where either state courts or lower federal courts, in evaluating RFRA claims, have improperly applied the pre-*Smith* test for a substantial burden, review might well be warranted. But this possibility provides no basis to grant review here, since the California Supreme Court carefully and correctly applied well-established case law to determine that no substantial burden exists in this case.

III. CALIFORNIA'S PROHIBITION OF DISCRIMINATION SERVES COMPELLING AND IMPORTANT STATE INTERESTS BY THE LEAST RESTRICTIVE MEANS

Because the California Supreme Court found that petitioner's free exercise rights were not substantially burdened, it did not decide whether California law prohibiting marital status discrimination in housing furthers compelling state interests by the least restrictive means available. *Smith v. FEHC*, 12 Cal.4th at 1176. If this Court agrees that petitioner's free exercise rights are not burdened to a legally significant extent by a law prohibiting discrimination in a commercial enterprise, this Court also need proceed no further.

Assuming, however, that this Court should conclude that requiring a business owner to comply with antidiscrimination

laws does constitute an undue burden, it should still deny review. It is apparent that California has a compelling interest in prohibiting marital status discrimination in housing, and that a law of general applicability, with no exceptions for any discriminatory religious beliefs a landlord may espouse, is the only effective means to eradicate such discrimination.

A. California's ban on marital status discrimination in housing serves several compelling state interests.

Petitioner attempts to disparage the significance of California's ban on marital status discrimination in housing and other businesses affected with a public interest by referring to totally dissimilar situations, in which the state's interest is either not equally strong or is counterbalanced by competing situations. And, she completely ignores constitutional and statutory provisions evidencing the importance of eliminating marital status discrimination in housing. Even a cursory review of these provisions shows that compelling state interests are unquestionably being served.

1. California's constitutional right to privacy includes the right to be free from marital status discrimination in housing.

A right to privacy is expressly guaranteed in Article I, § 1, of the California Constitution. The specific reference to the inalienable right to privacy was added by a Privacy Initiative adopted by California voters on November 7, 1972. *Hill*, 7 Cal.4th at 15.

This right to privacy under the California Constitution is protected against nongovernmental intrusion as well as state action. "The repeated emphasis in the competing ballot arguments on private party relationships and transactions, as well as individual encounters with government, underscores the efforts of the Privacy Initiative's framers to create enforceable privacy rights against *both* government agencies *and* private entities." *Id.* at 17 (court's emphasis).

California's right to privacy includes "the right to live with whomever one wishes or, at least, to live in an alternate family with persons not related by blood, marriage, or adoption." *Adamson*, 27 Cal.3d at 130 (footnote omitted). There, the California Supreme Court considered a local ordinance restricting persons who could live together as a family to no more than five unrelated persons, as applied to a group of 12 adults who were not related by biological or legal ties, but who were "a close group with social, economic, and psychological commitments to each other" and who wished to live together. *Id.* at 127. Quoting the ballot argument for the Privacy Initiative, the California Supreme Court explained:

> The right of privacy is the right to be left alone. *It is a fundamental and compelling interest.* It protects our *homes*, our *families*, our thoughts, our emotions, our expressions, our personalities, our *freedom of communion*, and our *freedom to associate with the people we choose*. . . .

Id. at 130 (court's emphasis). The Privacy Initiative insures "a right of privacy not only in one's family but also in one's home." *Id.* In *Adamson*, the California Supreme Court cites, with approval, *Atkisson*, with its ban on discrimination against unmarried cohabiting adults and its determination that such a ban is "an invalid infringement of the right of privacy"). *Adamson*, 27 Cal.3d at 129, citing *Atkisson*, 59 Cal.App.3d at 98.

The Legislature's declaration that freedom from marital status discrimination in housing is the public policy of the state and its prohibition of such discrimination under the state's police power, further this fundamental right. This statute banning marital status discrimination in housing generally available to the public evidences the state's commitment to eradicating such discrimination.

2. California also has a compelling interest in protecting tenants' freedom of intimate association.

The federal constitution provides "certain kinds of highly personal relationships a substantial measure of sanctuary from

unjustified interference by the State." *Roberts*, 468 U.S. at 618. "Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.*, 468 U.S. at 619.

"[T]he freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987). Clearly, under the California Constitution, the protection for intimate associations extends to "persons not related by blood, marriage, or adoption." *Adamson*, 27 Cal.3d at 130.

Here, petitioner is asking for state approval, by means of a judicially created exception, of her discrimination against unmarried couples. In doing so, she is involving the state in denying tenants their right to seek housing without discrimination because of their choice of living arrangements. Her request, if granted, would immerse the state in making distinctions between those persons protected from housing discrimination and those who are not, based on whether and how those persons exercise their right of intimate association.

Courts must deny judicial aid to private discrimination, and not assist those who wish to deny others their rights. *Shelley v. Kraemer*, 334 U.S. 1, 17 (1948); *Barrows v. Jackson*, 346 U.S. 249, 254 (1953).

3. California has a compelling commitment to eradicating all discrimination by business establishments.

California's authority to regulate private businesses for the welfare of the general public is indisputable. States have long used their police power to eradicate discrimination and "protect[ ] the civil rights of historically disadvantaged groups. . . . " *Roberts*, 468 U.S. at 624. As Justice Douglas declared long ago in a case upholding a state law prohibiting private discrimination, "the police power of a State under our constitutional system is adequate for the protection of the civil rights of its citizens against discrimination. . . . " *Bob-Lo*

Excursion Co., 333 U.S. at 41 (Douglas, J., concurring, with Black, J.). *See also Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 609 (1982) (holding Puerto Rico had standing to sue to prevent discrimination against Puerto Ricans).

California prohibits housing discrimination based on marital status under "the police power of the state for the protection of the welfare, health, and peace of the people of this state." Cal. Gov't Code § 12920 (West Supp. 1996). It has declared that such discrimination violates the state's public policy. *Id.* Discrimination on the prohibited bases is " 'injurious to the public or against the public good.' " *Gantt v. Sentry Insurance*, 1 Cal.4th 1083, 1094, 4 Cal. Rptr. 874, 824 P.2d 680 (1992).

Discrimination by enterprises providing goods and services to the public offends a fundamental policy of this state. *Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721, 738, 180 Cal.Rptr. 496, 640 P.2d 115 (1982), *cert. denied*, 459 U.S. 858. *See also Koire v. Metro Car Wash*, 40 Cal.3d 24, 36, 219 Cal.Rptr. 133, 707 P.2d 195 (1985).

Constitutional challenges to the enforcement of California law prohibiting discriminatory membership practices by a professional association, based on the First Amendment rights of privacy and association, have been rejected by this Court, recognizing that "public accommodations laws 'plainly serv[e] compelling state interests of the highest order.' " *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 549; quoting *Roberts*, 468 U.S. at 624. *See also id.*, 468 U.S. at 623 ("Minnesota's compelling interest in eradicating discrimination" justifies any infringement on associational rights.); *New York State Club Ass'n v. NYC*, 487 U.S. 1, 12 (1988) (there is no "constitutional immunity to practice discrimination").

California's commitment to its citizens is that the state will protect them against housing discrimination that the California Legislature has declared to be contrary to public policy. The state legislature has obviously devoted a great deal of thought to this prohibition, and has balanced protection from discrimination and protection for free exercise.

When housing discrimination was first expressly prohibited, the Legislature exempted "any accommodations operated

by a religious, fraternal, or charitable association or corporation not organized or operated for private profit; provided, that such accommodations are being used in furtherance of the primary purpose or purposes for which the association or corporation was formed." Cal. Stats. 1963, ch. 1853, p. 3823, § 2, as amended by Cal. Stats. 1980, ch. 992, pp. 3144-3145, § 4, and Cal. Stats. 1992, ch. 182, p. 6, § 3.

State law now provides: "Nothing in this part shall prohibit a religious organization, association or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion or from giving preference to those persons, unless membership in that religion is restricted on account of race, color, or national origin." Cal. Gov't Code § 12955.4 (West Supp. 1996). This exemption does not apply to petitioner, since she neither qualifies as a nonprofit organization nor uses the housing to further any religious purposes.

The Legislature also provides an exemption from the nondiscrimination requirements of state law if a landlord merely refuses "to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household, provided that no more than one roomer or boarder is to live within the household, and the owner complies with subdivision (c) of Section 12955, which prohibits discriminatory notices, statements, and advertisements." Gov't Code § 12927, subd. (c)(2)(A) (West Supp. 1996). This exemption also does not apply to petitioner, who rents four separate units, none of which she herself occupies.

The California Legislature has already balanced the state's interest in eliminating marital status discrimination in housing with other competing interests. The decision by the Legislature that discrimination such as that practiced by petitioner injures the public and must be eliminated for the protection of society should be respected. As this Court explained when it upheld a federal ban on discrimination

against a claim that it interfered with free exercise of religion, "certain governmental interests [are] so compelling as to allow even regulations prohibiting religiously based conduct." *Bob Jones University*, 461 U.S. at 603.

Discrimination in access to public accommodations "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625. A state's decision to expand access to public accommodations reflects "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups. . . . " *Id.* at 626.

California has determined that eradicating invidious discrimination in housing, including marital status discrimination, is warranted under the state police power for "the protection of the welfare, health, and peace of the people of this state." Cal. Gov't Code § 12920 (West Supp. 1996). This determination should be respected.

B. A complete ban of discriminatory practices is the most effective means to eradicate discrimination.

The "least restrictive means" portion of the RFRA codifies existing law. If the strict scrutiny test applies to a law unduly burdening free exercise, it "must advance ' "interests of the highest order" ' and must be narrowly tailored in pursuit of those interests." *Church of Lukumi*, 508 U.S. at 546.

The purpose of the California law is to eliminate discriminatory practices. Given this goal, California's ban on discrimination is "the least restrictive means of achieving its ends." *Roberts*, 468 U.S. at 626. "The most effective tool the state has for combatting discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are narrowly tailored and there is no less restrictive alternative." *Swanner*, 874 P.2d at 280, n.9.

Given the state's compelling interests both in eradicating housing discrimination and in protecting the rights of privacy

and intimate association, there is no other effective alternative than simply to ban marital status discrimination.

IV. AN EXEMPTION FOR LANDLORDS WITH RELIGIOUS OBJECTIONS TO ANTIDISCRIMINATION LAWS WOULD BE UNCONSTITUTIONAL

An additional reason to reject petitioner's effort to overturn the decision by the California Supreme Court is that the exemption she seeks would favor adherents to one particular religious belief over adherents to other religious beliefs or persons with no religious beliefs. This would be an unconstitutional establishment of or preference for religion.

Both the federal and California Constitutions preclude the state from establishing or advancing any particular religion or religious beliefs.[5] U.S. Const. amend. I; Cal. Const. art. I, § 4 (West 1983). The California Constitution also forbids any religious preference. *Id.*[6]

To avoid establishment of religion, a state's action must first, have a secular legislative purpose; second, be one that neither advances nor inhibits religion; and third, not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Any exemption from nondiscrimination requirements for those business owners who have religious objections to such laws would violate at least two, and likely all three, of the *Lemon* criteria. There is no secular purpose, unrelated to advancing particular religious beliefs, for such an exemption. Furthermore, any such exemption would favor those who base their discrimination on religious grounds over those who wish to discriminate

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[5] The enactment of RFRA does not modify these guarantees. 42 U.S.C. § 2000bb-4.

[6] "The California Constitution . . . guarantees that religion shall be freely exercised and enjoyed 'without discrimination or preference.' Preference thus is forbidden even when there is no discrimination. The current interpretations of the United States Constitution may not be that comprehensive." *Fox v. City of Los Angeles*, 22 Cal.3d 792, 796, 150 Cal.Rptr. 867, 587 P.2d 663 (1978).

for other reasons. Finally, if the Commission or the courts were to excuse discrimination by those sincerely asserting religious beliefs, yet outlaw discrimination for nonreligious reasons, this would foster excessive entanglement.

Additionally, exempting an owner who discriminates because of religious beliefs would favor that owner and his or her religion at the expense of a prospective tenant who has contrary religious beliefs or no religious beliefs, and the right of that tenant to nondiscrimination in housing. This would also violate the Establishment Clause. The United States Supreme Court has clearly held that the Establishment Clause precludes a state from requiring that one person's religious beliefs control over those of other persons or over secular interests. *Estate of Thornton*, 472 U.S. at 709. The state may not favor "one religion over another nor religious adherents collectively over nonadherents." *Board of Ed. of Kiryas Joel v. Grumet*, ___ U.S. ___, 114 S.Ct. 2481, 129 L.Ed.2d 546, 556 (1994).

Here, petitioner's religious beliefs cause her to believe it is a sin to rent to unmarried couples. Another landlord may consider it is a sin to rent to interracial couples. *See, e.g., Bob Jones University*, 461 U.S. at 580 ("The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage."). Another landlord may well believe that renting to a person with a disease is abetting a sin. *See, e.g., Walker v. Superior Court*, 47 Cal.3d 112, 119, n.1, 253 Cal.Rptr. 1, 763 P.2d 852 (1988) ("Members of the Church 'believe that disease is a physical manifestation of errors of the mind.' "). Still another may refuse to rent to non-Christians. *See, e.g., Pines v. Tomson*, 160 Cal.App.3d 370, 389, 206 Cal.Rptr. 866 (1984) (directors of nonprofit religious corporation believed that "compelling them to accept advertisements from non-Christians would force appellants to subscribe to non-Christian beliefs. . . . ").

The state cannot approve discrimination based on certain religious beliefs but prohibit discrimination based on other religious beliefs, or on no religious belief, without offending the Establishment Clause. And it cannot allow those with

petitioner's beliefs to discriminate without violating California's constitutional ban on religious preferences.

CONCLUSION

Petitioner is seeking the right to discriminate in business activities affecting the public interest. The fact that she does so based on sincerely held religious beliefs does not alter the nature of the relief that she seeks.

The California Supreme Court properly focused on the legally insignificant burden that the state's anti-discrimination laws impose on petitioner's free exercise of religion. It determined that because she is operating her business for profit, not for religious motives, and because nothing in her religious beliefs requires her to be a landlord, the burden on her free exercise rights is not substantial. This conclusion is completely consistent with this Court's decisions as to what constitutes an undue burden.

"When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. Petitioner may believe whatever she wishes, but she has no right to force those with whom she does business to agree with her beliefs, nor to deny housing to those who disagree with her beliefs.

For the foregoing reasons, the petition for writ of certiorari to review the decision of the California Supreme Court should be denied.

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